



U.S. Citizenship
and Immigration
Services

(b)(6)

[Redacted]

Date: AUG 01 2014

Office: OAKLAND PARK, FL

FILE: [Redacted]

IN RE: [Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[Redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida. The field office director's decision was appealed to the Administrative Appeals Office (AAO) and the appeal was dismissed. The applicant then filed two separate motions, which were dismissed by the AAO. The matter is now before the AAO on a third motion. The motion will be granted and the appeal sustained.

The applicant is a native of Jamaica and a citizen of Jamaica and Canada who was found to be inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The applicant sought a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). In a decision, dated April 9, 2009, the field office director concluded that the applicant had failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel declared that the applicant's husband was suicidal and had undergone treatment for depression that was related to the applicant's wife's inadmissibility to the United States. Counsel also stated that the applicant's husband's mother died from cancer two years ago and that his nephew was murdered. Counsel maintained that the applicant's husband would experience extreme hardship if the waiver was denied.

In our decision, dated February 27, 2012, we stated that the applicant had failed to demonstrate that her husband would experience extreme hardship if he remained in the United States without her. Additionally, the applicant had not submitted evidence to demonstrate that her husband would experience extreme hardship if he joined her to live in Canada and if he relocated to Jamaica.

With his first motion, counsel submitted new evidence to address the issues cited by the AAO in its decision and to show the applicant's spouse was rehabilitated. The new evidence submitted on motion included: a brief, two affidavits from the applicant's spouse, one statement from the applicant, and four letters attesting to the applicant's rehabilitation.

In our decision, dated August 28, 2013, we stated that the applicant's spouse had established that he would suffer extreme hardship upon separation from the applicant because of severe mental health issues and lack of any other familial support. However, the waiver application was denied because we also found that the applicant had not submitted evidence to demonstrate that her husband would experience extreme hardship if he joined her to live in Canada and if he joined her to live in Jamaica.

With his second motion, counsel submitted new evidence of the applicant's spouse's criminal record in the United States and asserted that the applicant's spouse would not be able to relocate because of his serious criminal background. Counsel submitted a brief, criminal records for the applicant's spouse, documentation regarding the immigration laws of Canada and Jamaica, and a sworn statement from the applicant's spouse.

In our decision, dated January 2, 2014, we focused on whether the applicant had established extreme hardship to her spouse as a result of relocating to Canada and Jamaica and asserted that the record did not show that she did establish extreme hardship in the event of relocation. As stated in previous decisions, the record indicates that the applicant's spouse has a serious criminal record including convictions for trafficking in heroin in 2003 and possession of drugs without a prescription in 2010. His record also includes numerous arrests. His most recent arrest was in 2011 for Aggravated Assault with a Deadly Weapon and the charges for this arrest were dropped. In our decision, we stated that although we recognized that the applicant's criminal record would undoubtedly complicate relocation abroad, the documentation provided did not show conclusively that it would be impossible. We stated, that for example, the documentation submitted indicated that Canadian law provided for a rehabilitation waiver. The record did not indicate that the applicant and/or the applicant's spouse had made any attempts to obtain legal status in or permission to travel to either of these countries. Thus, we asserted that the record did not establish that the applicant's spouse would suffer extreme hardship upon relocation.

With his third motion, counsel submits a brief, documentation relating to the applicant's spouse's criminal record, a letter from an immigration attorney in Canada, a letter from an immigration attorney in Jamaica, and four character reference letters for the applicant. Counsel again states that the applicant's spouse is not able to relocate to Canada or Jamaica as a result of his criminal record.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The field office director found the applicant inadmissible under section 212(a)(2)(A)(i)(I) of the Act as a result of a conviction in 2002 in Canada for fraud over \$5,000 and convictions in 2005, in Florida, for unauthorized possession of identification card/driver's license, uttering a forged instrument, and resisting without violence. The applicant did not dispute this finding of inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on appeal or on motion. Thus, we will not discuss this finding further.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Section 212(h) of the Act provides, in pertinent part:

The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that --

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) and (II) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The applicant's U.S. citizen spouse is the only qualifying relative in this case. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative

would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. I.N.S.*, 138 F.3d 1292 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

Again, we will not disturb the previous finding that the applicant's spouse will suffer extreme hardship as a result of being separated from the applicant. This decision will focus on whether

the applicant has established extreme hardship to her spouse as a result of relocating to Canada and Jamaica.

As previously stated, the record indicates that the applicant's spouse has a serious criminal record including numerous arrests and convictions for trafficking in heroin in 2003 and possession of drugs without a prescription in 2010. Counsel asserts that the applicant's spouse would not be able to relocate to Jamaica or Canada because of his criminal record, thus resulting in separation from the applicant. In reviewing the documentation on motion, we now find that the record establishes that the applicant's spouse would not be able to relocate to Canada or Jamaica given his serious criminal record. A letter, dated January 21, 2014, from [REDACTED] Canada reviews the information in the applicant's spouse's case, cites to Canadian immigration law, and advises that the applicant's spouse would not be eligible for admission to Canada as he is not eligible for the rehabilitation waiver associated with criminal inadmissibility. In addition, a letter, dated January 30, 2014, from [REDACTED] Jamaica asserts that based on a review of the applicant's spouse's criminal record and pursuant to Section 4 of the Aliens Act of Jamaica and section 5A of the Jamaican Nationality Act, the applicant's spouse would not be eligible to register as a Jamaican citizen through his marriage. Thus, the record now establishes that the applicant's spouse would be unable to relocate to Jamaica or Canada and, in the event of removal, the only option for the couple would be to separate, which has been shown to be extreme hardship. Therefore, the applicant has shown that her U.S. citizen spouse will suffer extreme hardship as a result of her inadmissibility.

Extreme hardship is a requirement for eligibility, but once established it is but one favorable discretionary factor to be considered. *Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). For waivers of inadmissibility, the burden is on the applicant to establish that a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *Id.* at 299. The adverse factors evidencing an alien's undesirability as a permanent resident must be balanced with the social and humane considerations presented on his behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of this country. *Id.* at 300.

The AAO notes that *Matter of Marin*, 16 I & N Dec. 581 (BIA 1978), involving a section 212(c) waiver, is used in waiver cases as guidance for balancing favorable and unfavorable factors and this cross application of standards is supported by the Board of Immigration Appeals (BIA). In *Matter of Mendez-Moralez*, the BIA, assessing the exercise of discretion under section 212(h) of the Act, stated:

We find this use of *Matter of Marin*, *supra*, as a general guide to be appropriate. For the most part, it is prudent to avoid cross application, as between different types of relief, of particular principles or standards for the exercise of discretion. *Id.* However, our reference to *Matter of Marin*, *supra*, is only for the purpose of the approach taken in that case regarding the balancing of favorable and unfavorable factors within the context of the relief being sought under section

212(h)(1)(B) of the Act. *See, e.g., Palmer v. INS*, 4 F.3d 482 (7th Cir.1993) (balancing of discretionary factors under section 212(h)). We find this guidance to be helpful and applicable, given that both forms of relief address the question of whether aliens with criminal records should be admitted to the United States and allowed to reside in this country permanently.

Matter of Mendez-Moralez at 300.

In *Matter of Mendez-Moralez*, in evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the BIA stated that:

The factors adverse to the applicant include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of an alien's bad character or undesirability as a permanent resident of this country. . . . The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where the alien began his residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value and service to the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends, and responsible community representatives). . . .

Id. at 301.

The BIA further states that upon review of the record as a whole, a balancing of the equities and adverse matters must be made to determine whether discretion should be favorably exercised. The equities that the applicant for section 212(h)(1)(B) relief must bring forward to establish that he merits a favorable exercise of administrative discretion will depend in each case on the nature and circumstances of the ground of exclusion sought to be waived and on the presence of any additional adverse matters, and as the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting favorable evidence. *Id.* at 301.

The favorable factors in the applicant's case include: the hardship to the applicant's spouse as a result of her inadmissibility; her lack of any criminal record since 2005, her employment as a successful realtor in Naples, Florida, and, as stated in numerous character references in the record, the applicant's attributes as a hardworking and caring community member. The unfavorable factors in the applicant's case include the applicant's criminal record and her illegal residence in the United States.

Although the applicant's immigration violations are serious, the positive factors in this case outweigh the negative factors. In these proceedings, the burden of establishing eligibility for the waiver rests entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In this case, the applicant has met her burden. The motion is granted and the appeal will be sustained.

ORDER: The motion is granted and the appeal sustained.